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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

WILLIAM G. NORDVIK AND CLAIRE N. NORDVIK,

Petitioners,

v.

COMMISSIONER, INTERNAL REVENUE SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the definition of "unreasonable" delaying conduct of a citizen (which will justify a denial of attorneys fees under the Equal Access to Justice Act and the Internal Revenue Code) require some improper, wrongful, or unjustified conduct, or are courts permitted unlimited discretion to find that any good faith error by a citizen's attorney will be "unreasonable" conduct?

2. Does Due Process require that a citizen seeking attorneys fees under the Equal Access to Justice Act and the Internal Revenue Code be permitted some opportunity, by brief or at a hearing to answer the government's allegations that the citizen's conduct has been "unreasonable"?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

A. THE NINTH CIRCUIT DECISION CREATES A VAGUE AND UNDEFINED LEGAL STANDARD, WHICH WILL CAUSE NEEDLESS FEDERAL LITIGATION OVER ATTORNEYS FEES 8

1. The Question Of "Unreasonable" Conduct Pervades All Federal Civil Litigation Under The Equal Access Of Justice Act, As Well As The Internal Revenue Code 8

2. The Ninth Circuit Has Created A Vague And Undefined Standard That Will Cause Needless Litigation 9

B. THE NINTH CIRCUIT ERRONEOUSLY DENIED ALL ATTORNEYS FEES WHILE THE STATUTE PERMITS A DENIAL OF ONLY A PORTION OF THE FEES 16

TABLE OF CONTENTS – Continued

Page

C. THE TAX COURT DENIED DUE PROCESS TO THE NORDVIKS BY ADOPTING THE GOVERNMENT'S ALLEGATIONS AS "UNDISPUTED FACTS," WITHOUT GIVING THE NORDVIKS ANY OPPORTUNITY TO ANSWER THESE ALLEGATIONS 17

D. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS CONCERNING THE JURISDICTION OF THE TAX COURT AND THE COURTS OF APPEAL 19

CONCLUSION 21

APPENDIX

Opinion of the Ninth Circuit: .....App. 1

Order Denying Rehearing in the Ninth Circuit .....App. 21

Memorandum Opinion of the Tax Court .....App. 22

TABLE OF AUTHORITIES

Page

CASES

Apollo Drywall Inc. v. U.S. (D.C. MI, 1993) 71 A.F.T.R.2d (RIA) 93-1689 13

Arkansas Best Corp. v. C.I.R., 485 U.S. 212 (1988) 15

Armstrong v. Manzo, 380 U.S. 545 (1964) 18

Bowman v. Lopereno, 311 U.S. 262 (1940) 20

Buck v. C.I.R., 65 Tax Ct.Mem.(CCH) 1743 (1993) 13

Corn Products Refining Co. v. C.I.R., 350 U.S. 46 (1955) 14

Denholm & McKay v. C.I.R., 132 F.2d 243 (1st Cir. 1932) 20

Golden Gate Audubon Soc. v. U.S. Army Corps of Eng., 732 F.Supp. 1014 (N.D. Cal. 1989) 13

Huffman v. C.I.R., 978 F.2d 1139 (9th Cir. 1992) 9

Kreimes v. Dept. of Treasury, 764 F.2d 1186 (6th Cir. 1985) 13

Milliken v. Myer, 311 U.S. 457 (1940) 19

Mullane v. Hanover Trust Co., 339 U.S. 306 (1949) 19

Pierce v. Underwood, 487 U.S. 552 (1988) ..... *passim*

Pohl Corp. v. United States, 29 Fed.Cl. 66 (1993) 9

Powell v. Commissioner, 791 F.2d 385 (5th Cir. 1986) 9

Simon v. C.I.R., 176 F.2d 230 (2d Cir. 1949) 20

MISCELLANEOUS

Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 Pepperdine Law Rev. 637 (1990) 16

PETITION FOR WRIT OF CERTIORARI

Petitioners William and Claire Nordvik respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 20, 1995, and the subsequent denial of the Petition for Rehearing, entered on January 16, 1996.

OPINIONS BELOW

The Opinion of the Ninth Circuit is reported at 67 F.3d 1489, and is reprinted at page 1 of the Appendix.

The Memorandum Opinion of the United States Tax Court (Tax Court Memorandum 1992-731) has not been officially reported, but was reprinted in the CCH loose leaf service at 64 Tax Ct.Mem.(CCH) 1615 (1992).

JURISDICTION

The Tax Court had jurisdiction over the initial tax dispute and attorney fee claim under 26 U.S.C. §§ 7422 and 7430. This Court has jurisdiction to review the decision of the Ninth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

[partial text]

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

26 U.S.C. § 7430. AWARDING OF COSTS AND CERTAIN FEES

[partial text]

(a) In general.

In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for –

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) Limitations

. . . . **(4)** Costs denied where party prevailing protracts proceedings.

No award for reasonable litigation and administrative costs may be made under subsection (a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

(c) Definitions

For purposes of this section –

. . . . **(4) Prevailing party**

(A) In general. The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved) –

(i) which establishes that the position of the United States in the proceeding was not substantially justified,

(ii) which –

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented. . . .

TAX COURT RULE 232.
DISPOSITION OF CLAIMS FOR LITIGATION AND ADMINISTRATIVE COSTS [partial text]

(a) GENERAL: A motion for reasonable litigation or administrative costs may be disposed of in one or more of the following ways, in the discretion of the Court:

(1) The Court may take such action as it deems appropriate, on such prior notice, if any, which it may consider reasonable. The action of the Court may be taken without written response or hearing.

(2) The Court may take action after directing that a written response be filed. In that event, the motion shall

be served upon the Commissioner, who shall file such response within 60 days after service of the motion.

(3) After receiving the Commissioner's response, the Court may direct a hearing, which will be held at a location that serves the convenience of parties and the Court. A motion for reasonable litigation or administrative costs ordinarily will be disposed of without a hearing unless it is clear from the motion and the Commissioner's written response that there is a bona fide factual dispute that cannot be resolved without an evidentiary hearing.

STATEMENT OF THE CASE

This Petition focuses on the conduct (or misconduct) of the the Internal Revenue Service ("IRS") and the Petitioners ("Nordviks") for a one year period after they had initially settled a tax dispute. The Nordviks sought an award of attorneys fees under 26 U.S.C. § 7430, because the positions of the IRS were not "substantially justified." The courts below denied any award, on the basis that the Nordviks had "unreasonably" protracted the case.

The case began in October 1989, when the IRS proposed additional taxes and penalties amounting to approximately $170,000 against the Nordviks for the years 1982 through 1986. The IRS had disallowed deductions and credits related to several wind-energy projects of the Nordviks. The Nordviks filed a timely petition in the Tax Court, and their counsel met with the IRS to try to settle the case. In February 1991, the parties agreed to settle the case on the basis that the Nordviks would be allowed deductions and credits to the extent that the

Nordviks had actually paid the promissory notes that had been used to partially fund the projects. The Nordviks had, in fact, paid all of these notes, and expected that all of their deductions and credits would be allowed.

The trial was set for Monday March 11, 1991, but on March 7, the IRS telephoned the Nordvik's counsel to advise that the settlement had to be modified to apply the "at risk" rules of 26 U.S.C. § 465 to limit the Nordvik's deductions.[1] The IRS stated that they had applied § 465 to the various properties and multi-year payments on the notes, and that the net result was tax liability of $21,004 for 1984 and no tax liability for any other year. Since the trial was only a few days away, the parties stipulated to this amount, and the IRS promised to promptly send counsel the workpapers on the tax calculations. The stipulated judgment was submitted to the Court on the March 11 trial date, and the Court entered its formal decision on April 10, 1991.

Despite several requests from the Nordvik's counsel, the IRS did not send counsel the workpapers until April 23, 1991. At that time, Nordvik's counsel was complying with expedited discovery and briefing orders of the U.S. District Court for the Northern District of California (Judge William Ingram) on a Temporary Restraining

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[1] Generally, § 465 provides that if non-recourse promissory notes are used to purchase depreciable property, then no depreciation deductions are allowed until the taxpayer makes payment on the notes (or becomes "at risk" for a loss). For example, if the Nordviks used a non-recourse note to purchase property in 1984, and did not pay the note until 1985, then a portion of the 1984 depreciation deduction would not be allowed for 1984, but would be deferred to 1985.

Order and Preliminary Injunction under F.R.C.P. 65 in an unrelated case. Counsel did not have an opportunity to review the IRS workpapers until late May 1991. At that point, counsel discovered that the IRS calculations did not comply with the settlement agreement, and instead attempted to apply clearly incorrect law. Counsel advised the Nordvik's of the problem, and in mid-June obtained their instructions on how to proceed. On June 28, counsel presented the IRS with an outline of the errors and proposed corrections. Because the deadline for filing in the Tax Court was about to expire on July 10, counsel filed an application to file an untimely motion to vacate on July 5, 1991.[2]

The Tax Court permitted the Nordviks to file a late Motion to Vacate, and eventually vacated the earlier erroneous judgment. However, the IRS refused to concede that they were applying incorrect law. This refusal continued until March of 1992, when Nordvik's counsel located certain older (1988) private letter rulings of the IRS, which had admitted that the IRS position was incorrect. The IRS finally conceded the issue and the correct judgment, for zero tax liability, was entered in April of 1992. The Nordviks filed an application for attorneys fees under 26 U.S.C. § 7430, which permits a prevailing party in tax litigation to recover fees if the position of the IRS is

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[2] The Tax Court does not follow F.R.C.P 60, which allows one year to file a motion to vacate a judgment entered as a result of mistake or fraud. Instead, these issues must be raised within 30 days of judgment under Tax Court Rule 162. However, at any time within 90 days of the judgment, a party can request that the Tax Court permit a late filing of a motion to vacate.

not "substantially unjustified." The motion alleged that the IRS position for the period following the March 1991 settlement until the IRS finally conceded the case in March of 1992, had not been "substantially justified".

Tax Court Rule 232 gives the court several options for deciding an attorney fee application. In this case, the Tax Court requested that the IRS file an Opposition to the Nordvik's motion. The IRS filed such an Opposition, which alleged for the first time that the Nordviks had "unreasonably protracted" the proceedings and should be denied any fee award pursuant to § 7430(b)(4). Tax Court Rule 232 does not permit the taxpayer to file any response to the IRS allegations, nor can the taxpayers request a hearing after seeing the allegations. Instead, Rule 232(a)(3) states that the court may order a hearing if the papers of the IRS present a *bona fide* factual dispute. The Tax Court did not order a hearing on the Nordvik motion, and did not permit them to make any other response to the IRS allegations.

The Tax Court then adopted the IRS allegations as the "undenied allegations" in the record (App. 23-24, 29). Relying on these undenied allegations, the court denied the Nordviks' fee application, stating, *inter alia*, that the Nordviks had "belatedly" informed the IRS of the private letter rulings, and that the Nordviks had known the results of the IRS calculations before the Tax Court entered judgment, but waited 86 days before bringing their Motion to Vacate the decision (App. 30-31). The Nordviks appealed, and the Ninth Circuit affirmed. The Ninth Circuit ruled that the fact that the Nordvik's counsel had relied upon the IRS's representation of the correctness of the $21,004 figure, and had not moved more

quickly in bringing the motion to vacate, could constitute "unreasonable" conduct. The Ninth Circuit denied fees for the *entire* period from March 1991 to March 1992, even though the Court found that the Nordviks had only caused a delay up to July of 1991 at the latest. The Nordviks filed a timely petition for rehearing in the Ninth Circuit, which was denied on January 16, 1996.

REASONS FOR GRANTING THE WRIT

A. THE NINTH CIRCUIT DECISION CREATES A VAGUE AND UNDEFINED LEGAL STANDARD, WHICH WILL CAUSE NEEDLESS FEDERAL LITIGATION OVER ATTORNEYS FEES.

1. The Question Of "Unreasonable" Conduct Pervades All Federal Civil Litigation Under The Equal Access Of Justice Act, As Well As The Internal Revenue Code.

The question presented in this case is what constitutes "unreasonable" conduct that will justify denying an attorney fee award to prevailing party in federal litigation. The present case presents this question under § 7430 of the Internal Revenue Code ("IRC"), but the identical question arises under the Equal Access to Justice Act ("EAJA") [5 U.S.C. § 504 and 28 U.S.C. § 2412(d)]. In fact, the language in 26 U.S.C. § 7430(b)(4) on "unreasonably" delaying the proceedings was inserted into the Internal Revenue Code specifically to mirror the identical requirement in the EAJA. Sen. Rep. No. 313, 99th Cong., 2d Sess. 199 (1986). The federal courts have recognized that where the provisions of § 7430 and the EAJA are identical, they

should be construed in a similar fashion, and decisions under one provision provide precedents and guidance for decisions under the other provision. *Huffman v. C.I.R.*, 978 F.2d 1139 (9th Cir. 1992); *Powell v. Commissioner*, 791 F.2d 385 (5th Cir. 1986); *Pohl Corp. v. United States*, 29 Fed.Cl. 66 (1993). Thus, the majority opinion of the Ninth Circuit in this case stands as a precedent for *all* federal courts in awarding attorneys fees in actions where the position of the federal government is not substantially justified.

Although this case presents an "important" federal question, a more important issue must be addressed in determining whether to grant certiorari. That is: does the Ninth Circuit opinion present a serious problem that justifies a pronouncement from the Supreme Court at this time? In this case, the answer is yes, because the holding below is not only an "error," it is an error that creates a vague and open-ended standard that will encourage needless litigation throughout all levels of the federal courts.

2. The Ninth Circuit Has Created A Vague And Undefined Standard That Will Cause Needless Litigation.

Both the EAJA and IRC § 7430 permit an award of attorneys fees to the extent that the government's position in a case is "unreasonable." See *Pierce v. Underwood*, 487 U.S. 552 at 563-566 (1988) (holding that the "substantially justified" test is one of "reasonableness in law and fact"). In addition, both statutes deny recovery of attorneys fees to the extent that a citizen has engaged in "unreasonable" conduct that has delayed the resolution

of the case. The plain language of the statutes creates a simple, reciprocal rule: the citizen is entitled to a fee award to the extent that the government engages in unreasonable conduct, and the citizen is to be denied fees to the extent that the citizen engages in unreasonable conduct. The question is what is meant by "unreasonable" delaying conduct. The Petitioners urge that in enacting these provisions, Congress had in mind the longstanding notion that "unreasonable" conduct meant conduct that was somehow "improper" or "wrongful." In fact, since *Pierce v. Underwood, supra,* demonstrates a correlation between "reasonable" and "justified," it would seem that a "justifiable" delay should be "reasonable" under the statute. The Ninth Circuit opinion, however, does not suggest that the Nordviks did anything "improper," "wrongful" or "unjustified." The opinion below gave *no* reason why the conduct of the Nordviks should be viewed as "unreasonable."

The major problem with the opinion below (and the problem that requires Supreme Court review), is that the Ninth Circuit has virtually *eliminated* the "unreasonableness" requirement, and has instead ruled that any minor delay or any good faith error in judgment by counsel can justify a denial of attorneys fees.

As stated in the dissent of Judge Reinhart below,

> [T]he majority opinion implicitly sets an unreasonable and unworkable standard for determining what constitutes an unreasonable delay. The majority does not and could not contend that the Nordviks filed frivolous motions or engaged in delaying tactics. . . . The majority's sole basis for concluding that the Nordviks unreasonably

> protracted the proceedings is its *ipse dixit* pronouncement that the Nordviks should have acted more expeditiously in challenging the IRS' flawed calculations.
>
> . . . the majority cites no case to support its conclusion. *Nor does the majority enunciate any general principles that it used, or that lower courts should use, in determining whether or not taxpayers have unreasonably protracted proceedings.* . . . Thus, at the end of its opinion as at the beginning, we are left without any legal explanation of why the majority has concluded that the Nordviks engaged in unreasonable delay and thereby should be forced to forfeit their right to attorneys' fees.
>
> Dissent of Judge Reinhart (App. 17-18) [emphasis added]

The problem in this case is the *absence of any principles* to guide other courts. For the law, like nature, abhors a vacuum, and a major appellate case that fails to enunciate any rules is *itself* an important legal precedent. However, it is precedent for the argument that there are *no* rules. As the above quote from the dissent noted, the majority opinion below does not require any finding of misconduct or impropriety by the citizen, and the dissent also noted that there is no requirement that the citizen's conduct cause any harm or expense to the government. (Dissent at App. 20)[3] Moreover, the majority decision below

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[3] The Ninth Circuit standard thus deviates from the usual guideline (in other areas of law) that in exercising discretion, a court should look at "the justifiability of the tardy litigant's delay and the absence of prejudice to his adversary." See *Pierce v. Underwood, supra,* at 562.

does not even require that the conduct actually cause any *real* delay in the resolution of the proceedings, since the record in this case shows that the IRS continued to maintain its unreasonable position for 10 months following the time that the erroneous calculation was brought to the attention of the IRS and the Tax Court. (Dissent at App. 19-20: delay from July 1991 to May 1992.) There is nothing to suggest that the case would have been resolved any earlier if the Nordviks had declined the settlement in March, or brought their Motion to Vacate earlier.

The majority opinion below can be cited (and most certainly *will* be cited) for the proposition that the trial court should deny fees whenever there is some perceived "imperfection" in the citizen's handling of the case. The present opinion supports the claim that fees should be denied whenever the citizen's attorney could have been "less trustful" or "less conciliatory" or "wiser" or "more aggressive" or "less busy." Fees can be denied whenever the trial judge feels that the case just could have moved along a little faster (a view that every trial judge seems to have at some point in a case). The problem with this *de facto* elimination of the "unreasonable" requirement is that it opens up a Pandora's Box of endless questions that the government will ask the trial (and appellate) courts to resolve before awarding any attorneys fees. By dropping any requirement that "unreasonable" conduct involve some improper or wrongful action, the Ninth Circuit has opened the door to the undesirable result that all requests for attorneys fees will result in "a second major litigation." See *Pierce v. Underwood*, 487 U.S. 552 at 563 (1988).

There are numerous examples of routine conduct that the government might now claim is "unreasonable"

under the opinion below. Something as routine as requesting several extensions of time to respond to discovery could now be "unreasonable" delay. Certainly, filing objections to discovery which are later overruled at a hearing would be more "unreasonable" than the conduct condemned in this case.[4] The decision below opens up a fertile ground for further, endless disputes over attorneys fees. The new arguments to be raised are as limitless as the imagination of creative attorneys.[5] The problem is not that trial courts will hand down a series of "wrong" decisions: the problem is that to *reach* a decision, the trial and appellate courts will now have to wade

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[4] Compare, *Apollo Drywall Inc. v. U.S.*, (D.C. MI, 1993) 71 A.F.T.R.2d (RIA) 93-1689, which held that the taxpayer acted unreasonably by engaging in the recognized misconduct of filing a motion to compel discovery without complying with local court rules that required a good-faith effort to resolve the discovery dispute before seeking a court order.

[5] It is an unfortunate factor in all EAJA and § 7430 cases that neither time nor money limitations apply to government attorneys. The government will raise any "non-frivolous" position to defeat a fee claim. See, *e.g.*, *Buck v. C.I.R.*, 65 Tax Ct.Mem.(CCH) 1743 at 1746 (1993), where the government argued that the citizen's failure to agree on an attorneys fee claim was unreasonably protracting the proceedings; *Kreimes v. Dept. of Treasury*, 764 F.2d 1186 (6th Cir. 1985), where the government pursued an appeal to argue that just a portion of a $9,000 fee award should be disallowed. See also *Golden Gate Audubon Soc. v. U.S. Army Corps of Eng.*, 732 F.Supp. 1014 at 1021-22 (N.D. Cal. 1989), where the court noted that the government's "intense" litigation of the fee application had caused the cost of the fee dispute to approach the costs of the case on the merits. This is the type of problem this Court hoped to avoid in *Pierce v. Underwood*, 487 U.S 552 at 563.

through an additional morass of previously unnecessary questions.

Creating more litigation over fee awards frustrates the purposes of the statutes. These statutes were enacted to discourage unreasonable conduct by the government, and to reimburse citizens who are required to go to court to withstand unreasonable government action. The rule created by the Ninth Circuit permits the government to say, "Yes, our position in the litigation was unreasonable, but let's ignore the unreasonable conduct of the government, and instead investigate the citizen for any minor imperfections." That is not the purpose of the law. As noted above, under these statutes the citizen should be entitled to fees to the extent that the conduct of the government is unreasonable, and the citizen should be denied such fees to the extent that his or her own conduct in the case was unreasonable. The definition of "unreasonable" must include some improper, wrongful or unjustified conduct. Otherwise, the Ninth Circuit has rewritten the statute to eliminate the "unreasonable" requirement, and to open a vast and unnecessary investigation into any minor perceived imperfections on the part of the citizen.

Judicial experience has shown that when vague, open-ended rules are permitted to stand, the federal courts must suffer through years of needless litigation before the rule is clarified. For example, in *Corn Products Refining Co. v. C.I.R.*, 350 U.S. 46 (1955), this Court attempted to explain the scope of the "inventory" exception to the definition of a capital asset in 26 U.S.C. § 1221. The Court held that certain hedging transactions were

within the scope of that exception. However, eager litigants seized upon open-ended language in the case, and the federal courts faced literally thousands of cases in which either the government or the taxpayer claimed that certain capital assets that had been acquired for a "business purpose," should be treated as ordinary income property. Finally, after years of litigation, this court clarified the rule in *Arkansas Best Corp. v. C.I.R.*, 485 U.S. 212 (1988), and put an end to the torrent of cases. There are certainly numerous other examples throughout Federal and State jurisdictions.[6] Federal courts certainly do not need *more* litigation over attorney fee awards. This Court should review this case to set a clear standard in this area.

It would be particularly unwise to endorse a rule that punishes the Nordviks for their attorney's good faith efforts to settle the case without a trial. As the Dissent below notes, the current rule "blames the victim rather than the wrongdoer." (App. 17) There is no dispute that the attorney acted in good faith, and there is no dispute that if the IRS had adhered to the initial settlement (instead of raising new, unreasonable positions) the case would have settled a year earlier without a trial. In hindsight, however, counsel's trust in the IRS was misplaced.

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[6] For example, in the famous California case of *Seamans Direct Buying Service v. Standard Oil Co.*, 36 Cal.3d 752 (1984), certain language indicated that a person could claim an independent tort for "wrongful denial" of a contract. Once again, the courts were forced to deal with thousands of cases, including many appellate level cases, before the rule was eventually clarified in *Freeman & Mills Inc. v. Belcher Oil Co.*, 11 Cal.4th 85 (1995)

But condemning the attorney's conduct as "unreasonable" is counter-productive. Recently, many jurists, scholars and lawyers have decried the growth of "hardball" or "Rambo" litigation tactics, and have urged greater cooperation and professionalism in litigation. See for example, the article by Judge Reavley of the Fifth Circuit, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 Pepperdine Law Rev. 637 (1990). The actions of the Nordviks' counsel in making a good faith effort to cooperate and settle the case without trial should be encouraged, not condemned as "unreasonable."

B. THE NINTH CIRCUIT ERRONEOUSLY DENIED ALL ATTORNEYS FEES WHILE THE STATUTE PERMITS A DENIAL OF ONLY A PORTION OF THE FEES.

26 U.S.C. § 7430(b)(4) specifically permits denial of fees only "with respect to any portion of the . . . proceeding during which the prevailing party has unreasonably protracted such proceeding." In the present case, the Ninth Circuit denied *all* attorneys fees to the Nordviks, even though it was undisputed that, "at most, two months can be fairly attributed to the Nordviks' failure to act more expeditiously." (Dissent at App. 19-20.) Under the statute, fees for the last 10 months should have been permitted in all events. The Ninth Circuit Opinion creates the impression that there is some type of conduct that will "taint" an entire fee claim. However, there is no basis in the statute for such a rule, and the Opinion presents no explanation for what type of conduct triggers this complete denial. As discussed above, such vague and open-ended rules are invitations to needless litigation, and

should be overruled. This additional "rule" is even *harder* to discern from the Opinion, and it opens up an even greater incentive (denial of *all* fees) for additional litigation.

C. THE TAX COURT DENIED DUE PROCESS TO THE NORDVIKS BY ADOPTING THE GOVERNMENT'S ALLEGATIONS AS "UNDISPUTED FACTS," WITHOUT GIVING THE NORDVIKS ANY OPPORTUNITY TO ANSWER THESE ALLEGATIONS.

The Tax Court purportedly based its opinion upon the "undenied allegations set forth in the record" (App. 23), but the court clearly adopted the factual allegations presented by the government in its Opposition to the Nordviks' Motion for Costs (see, *e.g.*, App. 29). Based upon the "undenied allegations" presented by the government, the Tax Court ruled that the Nordviks had acted "unreasonably."

After the Nordvik's filed their fee application, the Tax Court requested that the government file an Opposition. The government did file such a motion, and for the first time alleged that the Nordviks had "unreasonably protracted" the proceedings. Rule 232 does *not* permit the taxpayer to file any reply to the government's Opposition. The rule also permits the Tax Court to dispose of the fee motion without a hearing, but it does permit the court to order a hearing if, "it is clear from the motion and the Commissioner's written response that there is a bona fide factual dispute. . . . " The implication of the rule is that if the government's response raises new factual allegations, then the taxpayers will be given *some* opportunity to

respond. In this case, the government raised the factual question of whether the Nordviks had acted unreasonably. However, the Nordviks were *not* permitted to respond in any manner. This denial of any opportunity to respond was critical.

The Ninth Circuit upheld the determination that it was unreasonable for the Nordviks' counsel to take two months to review the IRS' calculations, consult with his clients, and make an untimely motion to vacate the stipulated judgment (App. 12-13). Both lower courts held that counsel should have completed these tasks in the 17 days from April 23 (when counsel received the calculations) to May 10 (the deadline for filing a timely motion). Yet the Tax Court never permitted the Nordviks to present *any evidence* to explain this delay: The Nordviks were never permitted to show that in late April and early May, 1991, their attorney was subject to a federal court order requiring expedited discovery and briefing related to a Temporary Restraining Order and Preliminary Injunction under F.R.C.P. 65, in an unrelated case. The Nordviks were never permitted to explain the "reasonableness" of missing the 17-day deadline. The record on this question was essentially silent until the oral argument at the Ninth Circuit (see footnote 1 of the Opinion at App. 3, referring to counsel's "busy schedule"). The Tax Court had none of these facts prior to reaching its decision on "unreasonable" conduct.

Certainly, due process does not require a hearing on every motion. However, notions of fundamental fairness require that a party be given *some* chance to present his or her case, or at least to respond to allegations of the opposing party. See, *e.g.*, *Armstrong v. Manzo*, 380 U.S. 545

at 550 (1964), holding that due process requires "an opportunity for a hearing appropriate to the nature of the case" (citing *Mullane v. Hanover Trust Co.*, 339 U.S. 306 at 313 (1949)) and further holding that due process requires that the parties receive "an opportunity to present their objections" (citing *Milliken v. Myer*, 311 U.S. 457 (1940)).

The Nordviks' Brief in the Ninth Circuit stated that a thorough review of all due process cases failed to disclose any case in which a party was not permitted to present his or her case in *some* fashion (whether by brief or by hearing). There is no authority permitting a court to adopt the factual allegations of one party as the findings of the court without allowing *some* response. This case should not be the first. Under Rule 232, it must be an abuse of discretion for the trial court to accept the government's allegations as "undisputed," without giving the Nordviks some opportunity to dispute them.[7]

D. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS CONCERNING THE JURISDICTION OF THE TAX COURT AND THE COURTS OF APPEAL.

As discussed in the opinion of the Ninth Circuit, there is a conflict between the Second Circuit and the

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[7] The Ninth Circuit Opinion notes that the Nordviks did not request a hearing. However, under Rule 232, the hearing must be requested (or not requested) before seeing the government's Opposition. The rule gives the Nordviks *no* opportunity to request a hearing after seeing the Opposition. The Nordviks are punished for failing to do what they were not permitted to do.

First Circuit over the extent of Tax Court jurisdiction. In *Denholm & McKay v. C.I.R.*, 132 F.2d 243 (1st Cir. 1932), the First Circuit ruled that if a taxpayer makes an untimely motion to vacate a Tax Court judgment, and the court grants the motion, the Tax Court will lose jurisdiction, and the time for appeal will expire 90 days after entry of the judgment. The Second Circuit ruled to the contrary, in *Simon v. C.I.R.*, 176 F.2d 230 (2d Cir. 1949), holding that the application to file an untimely motion to vacate will extend the time for appeal *if* the court in fact grants the application and permits the Motion to Vacate to be filed. The Second Circuit decision is consistent with this Court's decision in *Bowman v. Lopereno*, 311 U.S. 262 (1940), which applied a similar rule to a case arising under the bankruptcy laws. The Ninth Circuit decision in this case sides with the Second Circuit decision in *Simon*, and conflicts with the decision in the *Denholm*.

The Nordviks are not appealing the Ninth Circuit decision in their favor on this issue. However, if this Court should grant review of this case for the reasons outlined above, then the Court would also have the opportunity to resolve the conflict in the Circuits over this important jurisdictional issue. At present, the Nordviks do not know if the IRS will oppose the Petition for Certiorari, because the government may also wish to have this conflict resolved.

CONCLUSION

The decision of the Ninth Circuit has effectively rewritten the statute to eliminate any requirement that the conduct of the citizen be "unreasonable." This court should grant review to rule that "unreasonable" conduct means conduct that is "improper, wrongful, or unjustified." Such a rule is consistent with this Court's holding in *Pierce v. Underwood*, 487 U.S. 552 (1988), and would serve to eliminate a great deal of needless litigation over attorneys fees.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM G. NORDVIK; CLAIRE N. NORDVIK,

Petitioners-Appellants,

v.

COMMISSIONER INTERNAL REVENUE SERVICE,

Respondent-Appellee.

No. 93-70434.

Appeal from a Decision of the
United States Tax Court

Argued and Submitted
December 14, 1994 – San Francisco, California

Filed: October 20, 1995

Before: Stephen Reinhardt, Pamela Ann Rymer,
and Michael Daly Hawkins,* Circuit Judges.

Opinion by Judge Hawkins; Dissent by Judge Reinhart

COUNSEL

John P. McDonnell, Myers, Morley, Myers & McDonnell, Los Altos, California, for the petitioners-appellants.

Curtis C. Pett, Tax Division, United States Department of Justice, Washington, D.C., for the respondent-appellee.

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* Judge Hawkins was drawn to replace Judge Tang. He has read the briefs, reviewed the record and listened to the tape of oral argument held on December 14, 1994.

OPINION

HAWKINS, Circuit Judge:

We consider here the circumstances under which private parties may recover post-settlement litigation costs incurred in the tax court. Taxpayers Claire and William Nordvik ("the Nordviks") appeal the denial of their motion for such costs, which the tax court based on its finding that the Nordviks had unreasonably protracted the litigation and its conclusion that the government's position was substantially justified. We have jurisdiction under 26 U.S.C. § 7430 and we affirm.

I. Background

In early 1982 and again in 1984-85, the Nordviks invested in certain energy- producing wind turbines. In October 1989, the Internal Revenue Service ("IRS") mailed the Nordviks a Notice of Deficiency for the years 1983 through 1986, assessed for the total amount that the Nordviks claimed as tax credits for investments in the turbines and as deductions for business expenses incurred with respect to the turbines, including interest, taxes and depreciation. The deficiencies totaled $127,136 and the additions to tax assessed for negligence and valuation overstatement totaled another $44,497. The Nordviks filed a petition for redetermination and the case was set for trial.

Prior to trial, the parties agreed to settle the case. The IRS decided to allow the Nordviks a tax basis (i.e. a value for tax purposes) equal to the amount the Nordviks actually paid "out of pocket" for each turbine. The Nordviks

agreed to (and did) provide the IRS with documentation substantiating the amounts actually paid. The IRS agreed not to assess penalties for any deficiencies.

When the IRS contacted the Nordviks regarding the revised calculations, it proposed a $21,004 deficiency for 1984, no deficiencies for 1983, 1985 and 1986, and no penalties. The Nordviks agreed to stipulate that they owed this amount, even though they had not reviewed how the IRS had computed the proposed deficiency.[1] Pursuant to a formal, written stipulation, the tax court entered an order and decision on April 10, 1991 establishing the result agreed to by the parties.

After the tax court entered an order based on the parties' agreement, the IRS sent its computations to the Nordviks. When the Nordviks finally did review the figures, they concluded that the calculations contained several errors and sent the IRS a set of revised calculations along with an explanation of the errors they believed that the IRS had made. The Nordviks requested that the IRS explain these perceived errors.

The Nordviks thereafter sought and obtained permission to file an untimely motion to vacate or revise the April 10, 1991 decision and asked that it be revised after the parties agreed on the correct calculations.

The Nordviks and the IRS then attempted to come to an agreement on the Nordviks' tax liability. Although the

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[1] The Nordviks did not make their acceptance conditional upon their review of the IRS calculations. At argument, their counsel conceded that any delay in reviewing these calculations was not the fault of the government, but his own busy schedule.

parties resolved some issues, they still could not agree on the Nordviks' liability, so the Nordviks filed a motion to vacate or revise to which the IRS responded. These documents indicate that the Nordviks and the IRS disputed several calculations. The Nordviks thereafter filed a status report stating that no progress had been made in resolving the key issues. The tax court informed the parties that if they could not settle the matter by March 27, 1992, the court would rule on the motion to vacate or revise.

Following this, the Nordviks set forth their analysis of the disputed calculations and proposed a settlement agreement providing for no deficiencies and an adjustment on a credit owed to the Nordviks in a separate matter, the latter to avoid having to make precise calculations on minor issues. The IRS accepted this settlement offer and on May 12, 1992, the tax court entered a decision and order pursuant to this agreement.

The Nordviks filed a contemporaneous motion requesting that they be awarded litigation costs from the point at which they initially agreed to settle the case (March, 1991) through the tax court's approval of the second settlement (May 12, 1992). The tax court denied the motion for litigation costs in a memorandum decision filed December 29, 1992 and a formal order of denial entered on January 19, 1993. The Nordviks filed a motion for reconsideration on February 1, 1993, which the tax court denied on April 23, 1993. The Nordviks filed the present appeal on May 6, 1993.

II. Tax Court Jurisdiction

We first consider whether the tax court lacked jurisdiction to hear the motion to vacate or revise the original decision. The Commissioner claims that the tax court's original decision, entered on April 10, 1991, became final after ninety days, on July 9, 1991, and that the court lacked jurisdiction over any proceedings thereafter. The Nordvik motion sought litigation costs largely incurred during this period. If a tax court lacks jurisdiction over a dispute, it generally cannot award costs stemming from the dispute. *Latch v. United States,* 843 F.2d 1031, 1033 (9th Cir. 1988).

Jurisdiction of the tax court is a question of law which we review *de novo. Billingsley v. C.I.R.,* 868 F.2d 1081, 1084 (9th Cir. 1989). A decision of the tax court becomes final upon expiration of the time allowed for filing a notice of appeal, if no notice is filed. 26 U.S.C. § 7481(a)(1). Notice of appeal must be filed within ninety days. 26 U.S.C. § 7483. Once the decision becomes final, a tax court generally lacks jurisdiction to consider a motion to vacate or revise. *Billingsley,* 868 F.2d at 1084; *Abatti v. C.I.R.,* 859 F.2d 115, 117 (9th Cir. 1988).

Whether the tax court retained jurisdiction over the Nordviks' case depends on the effect of the court's decision to grant leave to file an untimely motion to vacate or revise. The Nordviks filed a motion for leave to file an untimely motion to vacate or revise on July 3, 1991, prior to the July 9, 1991, finality date. On July 19, 1991, the tax court granted leave to file the motion. Nordviks filed the motion on October 7, 1991, and the tax court entered a modified decision on May 12, 1992.

The effect of a motion for leave to file an untimely motion to vacate was discussed in a district court decision, which we affirmed without opinion. *See Haley v. C.I.R.*, 805 F. Supp. 834 (E.D. Cal. 1992), *aff'd. without opinion*, 5 F.3d 536 (1993), *cert. denied*, 114 S. Ct. 1538 (1994). In *Haley*, the tax court entered a judgment. Taxpayers filed a motion for leave to file a motion to vacate, along with the motion to vacate, some 87 days later. The tax court denied plaintiff's motion for leave to file a motion to vacate. *Haley* concludes that if a tax court denies an untimely motion for leave to file, then the motion does not extend the date upon which the tax court decision becomes final. *Id.* at 836. If a tax court grants the motion for leave to file and considers the merits of the motion to vacate, however, then the time for appeal is extended. *Id.*

The Second Circuit's analysis of tax court jurisdiction when the court grants a motion for leave to file, referenced in *Haley*, is consistent with the analysis of *Haley*. When a party files a motion requesting leave to file an untimely motion for review, along with the substantive motion, before the end of the ninety day period, the motions extend the time for appeal and therefore the date of finality. *Simon v. C.I.R.*, 176 F.2d 230, 232 (2nd Cir. 1949). The Second Circuit rejected the analysis of the First Circuit, which had concluded that the tax court retains jurisdiction to consider an untimely motion to vacate only if the court acts on the motion before the end of the ninety day period at which the original decision becomes final. *See Denholm and McKay Co. v. C.I.R.*, 132 F.2d 243, 248 (1st Cir. 1942). The Second Circuit reasoned that the

ability to seek review should not be dependent on the tax court's docket. *Simon*, 176 F.2d at 232.

By affirming *Haley* without opinion, we indicated our agreement with the decision. We now expressly adopt the portion of *Haley*, and the Second Circuit decision in *Simon*, applicable to the present case. If a tax court grants leave to file an untimely motion to vacate or revise before a decision becomes final, then the time for appeal runs from the decision on the motion to vacate or revise. The Nordviks filed a motion requesting leave to file an untimely motion to vacate or revise on July 3, 1991, prior to the July 9 ninety-day finality date. By granting the request and deciding the motion on its merits, the tax court extended the time for appeal and thereby the date on which the decision became final. Thus, the tax court retained jurisdiction over the subsequent proceedings.[2]

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[2] Nordviks claim that they filed both the motion requesting leave to file an untimely motion to vacate or revise, and the substantive motion, on July 3, 1991. However, the filing appears to be only an application for leave to file the substantive motion. In the July 3 application, they stated that revision would depend upon "further submissions by the Petitioners and the Government." Nordviks filed a "supplemental submission" on the motion to vacate or revise on October 7, 1991. This "supplement" is the substantive motion. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) (to determine the type of motion involved, courts look at the substance, not the title).

It is irrelevant that the Nordviks filed only the motion requesting additional time within ninety days, whereas in both *Haley* and *Simon*, the taxpayers filed both the motion for additional time and the substantive motion within the ninety day period. Both *Haley* and *Simon* indicate that, if leave to file is requested within the ninety days and the tax court thereafter

III. Timeliness of Appeal

We also consider whether this court lacks jurisdiction because the Nordviks did not timely appeal. A notice of appeal of a tax court decision must be filed within ninety days after the decision of the tax court is entered. 26 U.S.C. § 7483, Fed. R. App. P. 13(a). The timeliness of the Nordviks' appeal depends on the effect of the motion for reconsideration. The tax court entered its decision denying Nordviks' motion for an award of litigation costs on January 19, 1993. Nordviks filed a motion for reconsideration on February 1, 1993. On April 23, 1993, the tax court denied the motion for reconsideration. On May 6, 1993, Nordviks filed their notice of appeal from the tax court's decision. The Nordviks' notice of appeal is timely only if the ninety day period began to run from the date the motion for reconsideration was denied.

We have previously stated that a timely motion for reconsideration pursuant to tax court rule 161 does not terminate the time for filing a notice of appeal. *Trohimovich v. C.I.R.*, 776 F.2d 873, 875 (9th Cir. 1985). We relied on the language of Fed. R. App. P. 13(a),[3] which states that motions to vacate or revise a decision terminate the running of the time for appeal. *Id.* Rule 13(a) does not mention motions for reconsideration.

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makes a decision on the merits, then the time for appeal is extended. The Nordviks satisfy this criteria.

[3] Fed. R. App. P. 13(a) provides:

> The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court.

Our conclusion in *Trohimovich* is inconsistent with a subsequent Supreme Court decision. In *United States v. Ibarra*, 502 U.S. 1, 6-7 (1991) (per curiam), the Supreme Court held that the period for filing an appeal in a criminal case began to run on the date the district court denied the Government's motion for reconsideration. The Court applied the " 'well-established rule in civil cases,' " that the period for filing an appeal begins with denial of a petition for rehearing, which is akin to a motion for reconsideration.[4] *Id.* at 4 (quoting *United States v. Healy*, 376 U.S. 75, 78 (1964)). This approach is not based on an express statute or rule, but rather on " 'tradition and virtually unquestioned practice.' " *United States v. Dieter*, 429 U.S. 6, 8 n.3 (1976) (per curiam) (quoting *Healy*, 376 U.S. at 79). Because *Trohimovich* is inconsistent with *Ibarra*, we apply *Ibarra*'s holding that, absent an express rule to the contrary, a motion for reconsideration terminates the running of the ninety day limitations period.[5]

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[4] The *Ibarra* Court later repeated that "the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purpose of appeal for as long as the petition is pending." *Id.* at 6 (citing *United States v. Dieter*, 429 U.S. 6, 8 (1976)).

[5] We note that the decision in *Trohimovich* rested on two independent bases. In *Trohimovich*, the taxpayers filed a motion to revise or vacate, which the tax court denied. The taxpayers then filed a motion for "review" of the decision. After the tax court denied this motion, the taxpayers filed a notice of appeal. 776 F.2d at 875. We concluded that the notice of appeal was untimely for two reasons. First, we concluded that the motion for "review" essentially sought reconsideration, and therefore did not toll the time for filing an appeal. *Id.* Alternatively, we concluded that, even if the motion were a motion to vacate or

The benefits of the general rule set forth in *Ibarra* are equally applicable to tax cases. If the time for appeal begins running after denial of a motion for reconsideration, then the tax court has an opportunity to correct its own alleged errors. This procedure reduces the burden placed on courts of appeal. *Ibarra*, 112 S. Ct. at 6.

The advisory committee notes to Fed. R. App. P. 13(a) also support our conclusion that the time for appeal begins to run upon the date of decision on a timely motion for reconsideration. According to the notes, Rule 13(a) "states the settled teaching of the case law." In one of the cases cited in the advisory committee note, *Robert Louis Stevenson Apts., Inc. v. C.I.R.*, 337 F.2d 681, 683 (8th Cir. 1964), the Eighth Circuit concluded that motions which challenge the substance of the tax court's decision terminate the running of the three month period for filing an appeal. 337 F.2d at 683. In its reasoning, the Eighth Circuit sets forth a general rule akin to the rule discussed in *Ibarra*: " '[W]here a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion.' " *Id.* at 684 (quoting *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 204 (1943)). Motions for reconsideration fit within this broad category. Thus the "settled teaching of the case law" referenced in the advisory committee notes supports the conclusion that

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revise, it did not extend the filing deadline because successive motions asserting the same grounds cannot be tacked together to extend the time for filing an appeal. *Id.* The second, independent, basis for the decision stands unmodified.

motions for reconsideration terminate running of the time for appeal.

Nordviks' appeal was timely filed on May 6, 1993, a mere ten days after April 26, 1993, the date of the order denying the motion for reconsideration. Under *Ibarra*, the notice of appeal is timely.

IV. Attorney's Fees

We next consider whether the tax court erred in denying the Nordviks' motion for attorney's fees. In an administrative proceeding or court proceeding involving determination of taxes, the "prevailing party" may be awarded a judgment for reasonable administrative costs and reasonable litigation costs, including attorney's fees. 26 U.S.C. § 7430(a)(1)-(2), (c)(1). However, fees will be denied for any portion of the court proceedings during which the prevailing party "unreasonably protracted" the proceedings. 26 U.S.C. § 7430(b)(4).

The tax court concluded that the Nordviks had unreasonably protracted the proceedings. The court reasoned that the Nordviks did not question the deficiencies in the first settlement until they received the IRS calculations, after the court order was entered. In addition, the tax court noted that the Nordviks did not file a motion for leave to file an untimely motion to vacate or revise until eighty-six days after the original order was entered, well past the thirty-day deadline for such motions. The tax court decision is reviewed for abuse of discretion. *Estate of Merchant v. C.I.R.*, 947 F.2d 1390, 1392 (9th Cir. 1991).

The Nordviks stipulated to a settlement figure of a $21,004 deficiency without reviewing the IRS calculations. Although the Nordviks and the IRS had reached a general understanding, the only specific number that the Nordviks agreed on was this final deficiency figure. The Nordviks were unaware of how the IRS had arrived at this figure. They assumed that the IRS would allow various deductions and credits, but did not know whether the IRS had actually done so. Given the plethora of rules involved in calculating tax liability, it is not surprising that the Nordviks had several disagreements with the IRS once they did review the calculations. By this time, however, the tax court had long since entered judgment pursuant to the stipulation.

Because the Nordviks failed to review the calculations before settling, they ultimately spent several months quarreling with the IRS about the correct interpretation of the initial agreement. Had they agreed on a set of calculations initially, rather than a final figure, the later proceedings would have been unnecessary.[6]

The Nordviks compounded their problems by failing to review the IRS calculations promptly upon receipt on April 22, 1991. Had they done so, the Nordviks could have entered a timely motion to vacate or revise within

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[6] The fact that the settlement was provided to the tax court shortly before the trial date does not excuse the Nordviks' failure to review the IRS's calculations before stipulating to a final deficiency figure. The tax court likely would have given more time to the parties in the midst of settlement negotiations, as the tax court liberally granted the parties additional time later in the proceedings.

30 days of the tax court's April 10 decision. However, the Nordviks delayed their review until the ninety day finality period was almost at an end. They had to file an untimely motion for reconsideration. Considering both the Nordviks' failure to review IRS calculations before stipulating to a deficiency figure, and the failure to promptly review the IRS's calculations upon receipt after judgment, the district court's conclusion that the Nordviks unreasonably protracted the proceedings was not an abuse of discretion.[7]

V. Due Process Claim

Finally, the Nordviks claim that the tax court violated the Due Process Clause by adopting the Commissioner's statement of facts without giving the Nordviks a hearing. The Nordviks do not challenge the constitutionality of tax court rule 232(a)(3), which provides that a motion for attorney's fees "ordinarily will be disposed of without a hearing unless it is clear from the motion and the Commissioner's written response that there is a bona fide factual dispute that cannot be resolved without an evidentiary hearing."

In the Nordviks' case, the statement of facts contained within the tax court decision is largely a recitation of the dates and contents of the key filings and correspondence in the case. These facts are largely undisputed.

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[7] Because we conclude that the Nordviks unreasonably protracted the proceedings, we need not review the other basis for the tax court's decision – that the position of the IRS was substantially justified.

The record before the tax court contained the parties' filings, including: the first stipulated agreement, the Nordviks' motion to vacate or revise, the second stipulated agreement, the Nordviks' motion for litigation costs, IRS's responses and objections, and the parties' status reports. The record also contained the supporting affidavits and exhibits attached to those filings, including key correspondence between the Nordviks and the IRS.

The disputed legal issues and the facts relevant to these disputes are discussed in detail, repeatedly, in this record. Therefore, even if the Commissioner made a disputed statement of fact, the Nordviks' filings fully set forth their version of what had happened. The Nordviks could not have provided much more information at an oral hearing. Indeed, they did not even request one. The tax court satisfied the requirements of the tax court rules and the Due Process Clause.

The decision of the tax court is AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I do not believe that the government's position was substantially justified; nor do I believe that the Nordviks unreasonably protracted the litigation. Accordingly, I respectfully dissent.

The Nordviks entered into a settlement agreement with the IRS on March 7, 1991, four days before their case was scheduled for trial. Both sides agreed that the Nordviks would be permitted to count their "out of pocket" costs as the basis for their investment in wind turbines. As part of the settlement agreement, the Nordviks agreed

to pay a $21,004 deficiency for the 1984 tax year. That sum represented the amount of unpaid taxes that the IRS represented it had calculated by applying its "at risk" rules. When the IRS subsequently supplied the Nordviks with its figures, they discovered that it had misapplied its rules in calculating the deficiency. The Nordviks protested. More than one year later, the IRS belatedly acknowledged its mistake and agreed that they did not owe *any* money for the 1984 tax year.

The principal difference between the Nordviks and the IRS centered around the application of 26 U.S.C. § 48(q), which governs the calculation of the basis of an asset for purposes of depreciation. The key to resolving the controversy was a previously issued private letter ruling that § 48(q) does not apply to property placed in service before 1983. Since the wind turbine that the Nordviks depreciated on their 1984 tax return was put into operation in 1982, § 48(q) was clearly inapplicable – as the IRS eventually conceded. The IRS's attempt, in contravention of its own regulations, to apply § 48(q) to property put in service before 1983 was not substantially justified. In fact, it was not justified at all.

The Tax Court confuses the issue by noting that the Nordviks also offered other arguments in contesting the $21,004 deficiency. Whether or not the government had substantial justification for rejecting those other arguments, the IRS had no justification for refusing to acknowledge the validity of Nordviks' argument that

§ 48(q) could not apply to wind turbines put into operation in 1982. Since the government's position was not substantially justified, I turn to the issue of delay.[1]

The majority offers two separate arguments to support its conclusion that the Nordviks unreasonably protracted the litigation: 1) the Nordviks should not have agreed to the $21,004 deficiency without first reviewing the IRS calculations, even though the case was about to go to trial and both sides were under pressure to resolve the case and avoid a trial; and 2) the Nordviks should have reviewed the IRS calculations more quickly once they received them. In my opinion, these arguments are without merit.

Stripped of its legal embellishments, the majority's first argument is simply that the Nordviks should not have trusted the IRS to do what it promised to do. While the facts of this case show that to be true, I do not believe that innocent taxpayers may or should be penalized for assuming that the IRS will not contravene its own written

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[1] Taxpayers are not eligible to receive reimbursement for attorney's fees if they have unreasonably delayed the proceedings or if the government's position, although ultimately erroneous, was substantially justified. The Tax Court held that the government's position was substantially justified and that the Nordviks unreasonably protracted the proceedings. The majority opinion holds that the Nordviks caused an unreasonable delay in the proceedings but does not reach the issue of whether or not the government's position was substantially justified. Since I find that the Nordviks did not unreasonably delay the proceedings, I also reach the issue of whether or not the government's position was substantially justified.

policies in calculating a deficiency pursuant to a settlement agreement. The majority states: "Because the Nordviks failed to review the calculations before settling, they ultimately spent several months quarreling with the IRS about the correct interpretation of the initial agreement." Majority Opinion at 1494. The majority blames the victim rather than the wrongdoer. What it should have said is: "Because the IRS violated its own policies, the Nordviks were forced to spend a year convincing it that it had erred, and laboring to correct the IRS' mistake." In this case, had the Nordviks done what the majority suggests and refused to take on faith the IRS' deficiency determination for purposes of the settlement agreement, no agreement could have been reached in time to avoid the pending trial. That is obvious from the length of time it ultimately took to resolve the matter once the Nordviks learned of the IRS' error.

In punishing the Nordviks for not challenging the IRS' calculations sooner, the majority opinion implicitly sets an unreasonable and unworkable standard for determining what constitutes an unreasonable delay. The majority does not and could not contend that the Nordviks filed frivolous motions or engaged in delaying tactics. Indeed, judged against the backdrop of typical litigation today, this case was not marked by unusual delays and certainly not by protracted ones. The majority's sole basis for concluding that the Nordviks unreasonably protracted the proceedings is its *ipse dixit* pronouncement that the Nordviks should have acted more expeditiously in challenging the IRS' flawed calculations.

Not surprisingly, the majority cites no case to support its conclusion.[2] Nor does the majority enunciate any general principles that it used, or that lower courts should use, in determining whether or not taxpayers have unreasonably protracted proceedings. In fact, the majority cites only one case in its entire discussion of the Nordviks' conduct and that case, *Estate of Merchant v. C.I.R.*, 947 F.2d 1390 (9th Cir. 1992), is cited for the proposition that the IRS' positions are generally reviewed for an abuse of discretion. Thus, at the end of its opinion as at the beginning, we are left without any legal explanation of *why* the majority has concluded that the Nordviks engaged in unreasonable delay and thereby should be forced to forfeit their right to attorneys' fees.

As evidence of the Nordviks' responsibility for unreasonable delays, the majority notes that the Nordviks filed an untimely motion for reconsideration 86 days after the settlement became final. The majority, however, places undue and unjustified weight on the Nordviks' action in filing a motion for reconsideration after the 30-day period for filing such motions as of right had lapsed.[3]

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[2] It was the Nordviks who brought the private letter ruling to the INS' [sic] attention. As a matter of law, they cannot be blamed for not bringing the IRS letter to the IRS' attention sooner, for the private letter ruling was in the IRS' possession at all times. *See Pohl Corporation v. United States*, 29 Fed. Cl. 66, 73 (Ct. of Fed. Cl. 1993) (noting that plaintiff "did not unreasonably protract the proceedings by not specifically calling defendant's attention to papers already in its possession").

[3] Once again, the majority acts on the basis of its assumptions rather than the law. The majority does not cite a single case that holds that the 30-day window is significant when determining whether or not a litigant unreasonably

The tax court allowed the Nordviks to pursue their motion, thereby suggesting that the tax court itself concluded that Nordviks were not guilty of any serious or prejudicial delay. Moreover, an 86-day delay[4] is minimal in the context of this, and of most, litigation.

This case began in October of 1989 when the IRS sent the Nordviks a Notice of Deficiency. Eighteen months later, in March of 1991, the Nordviks and the IRS agreed to settle the case. After a written reminder from the Nordviks, the IRS provided the Nordviks with its computations on April 22, 1991. On July 3, 1991, slightly two months after *receiving* the IRS' written calculations, the Nordviks sought permission to file an untimely motion to vacate or revise the settlement agreement. By that point, the controversy had been going on for 21 months, and at most a delay of two months – measured from when the Nordviks received the written computation to when they challenged the erroneous computation – can fairly be attributed to the Nordviks.

The controversy was not finally resolved until May 12, 1992, ten months later. The final delay resulted from the IRS' intransigence in acknowledging its own mistake in calculating the Nordviks' deficiency, notwithstanding the Nordviks' best efforts to persuade the IRS of its error. Thus in all, the dispute dragged on 31 months, and at

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protracted proceedings. Nor does the majority cite a single case holding that an 86-day delay (or more accurately a 56-day delay) is a prolonged one.

[4] Really, it is only a 56-day delay since the Nordviks had 30 days according to the rules to file a motion for reconsideration.

most two months can be fairly attributed to the Nordviks' failure to act more expeditiously.

Not only was the delay relatively minimal, but the IRS did not present any evidence that the government was harmed by the delay or that the delay caused the government to incur any additional expenses. Given the minimal nature of the delay and the lack of any suggestion that the delay prejudiced the government, I respectfully disagree with the majority's decision to uphold the tax court's finding that the Nordviks unreasonably delayed the proceedings. Since there is no evidence that the Nordviks caused protracted delays in the proceedings and since the government's position was not substantially justified, I conclude that the tax court abused its discretion in denying the Nordviks' motion for attorneys' fees. In fact, in my opinion, the tax court and the majority have this case backwards. If anyone should be sanctioned for needless and unreasonable delay, it is the IRS and not the innocent taxpayers. Accordingly, I would reverse.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM G. NORDVIK; CLAIRE N. NORDVIK, Petitioners-Appellant, v. COMMISSIONER INTERNAL REVENUE SERVICE, Respondent-Appellee.	)	No. 93-70434 Tax Ct. No. 821-90 **ORDER** (Filed Jan. 16, 1996)

BEFORE: REINHARDT, RYMER, and HAWKINS, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing. The panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

WILLIAM NORDVIK AND CLAIRE NORDVIK,
Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

29 DEC 92
T.C. Memo. 1992-731

Judge: Clapp, Charles E., II

Filed December 29, 1992

John P. McDonnell, for petitioners.
Patrick W. Lucas, for respondent.

MEMORANDUM OPINION

CLAPP, JUDGE: This matter is before us on petitioners' Motion for Litigation Costs under section 7430 and Rule 231. Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Respondent determined the following deficiencies in and additions to petitioners' Federal income taxes:

		Additions to Tax		
Year	Defi-ciency	Sec. 6653 (a)(1)	Sec. 6653 (a)(2)	Sec. 6659
1983	$ 9,048	$ 452.40	/1/	$ 2,714.40
1984	64,757	3,237.85	/1/	19,427.10
1985	31,534	1,576.70	/1/	9,460.20
1986	21,797	/2/ 1,089.85	/1/	6,539.10

FOOTNOTES TO TABLE

/1/ Amount to be determined.

/2/ The additions to tax for 1986 are determined under sec. 653(a)(1)(A) and (a)(1)(B).

END OF FOOTNOTES

The parties have settled their dispute with respect to all of the tax deficiencies and additions to tax determined by respondent. Petitioners seek to recover only those litigation costs incurred after the parties ostensibly reached a basis for settlement and reported such to the Court in March 1991.

The issues the Court must consider to decide petitioners' motion are: (1) Whether respondent's position in this proceeding was substantially justified within the meaning of section 7430(c)(4)(A)(i);[1] and (2) whether petitioners have unreasonably protracted the proceedings in this case within the meaning of section 7430(b)(4). For the reasons stated below, we hold that respondent's position was substantially justified and that petitioners unreasonably protracted the proceedings.

BACKGROUND

The following statement of facts regarding the parties' settlement negotiations is based on the parties' filings in this case, including the parties' stipulated decision, petitioners' Motion to Vacate and Revise Decision, the Stipulation of Settlement, petitioners' Motion for Litigation Costs, respondent's various responses and objections, the parties' status reports, and the supporting affidavits and exhibits attached to those various filings. Under the circumstances of this case, we accept as facts

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[1] Sec. 7430 allows the Court to grant reasonable litigation costs in proceedings before the Court. References to sec. 7430 are to that section as amended by sec. 6239 of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3743- 3746.

for the purposes of petitioners' Motion for Litigation Costs the undenied allegations set forth in the record. *Polyco, Inc. v. Commissioner,* 91 T.C. 963, 966 (1988).

Petitioners, William and Claire Nordvik, are husband and wife and resided in Fremont, California, at the time of the filing of their petition. This case commenced on January 10, 1990, upon petitioners' filing of their petition with respect to two October 13, 1989, statutory notices of deficiency relating to petitioners' 1983, 1984, 1985 and 1986 taxable years. The deficiencies were based upon respondent's disallowance of certain deductions and tax credits claimed by petitioners regarding their investment in certain "Airtricity" or "Airmaster" wind turbines, which are types of energy- producing wind turbines.

The parties reached a basis for settlement on or about February 19, 1991. On March 7, 1991, respondent provided petitioner with a proposed decision document for the years at issue. The parties reported the case as settled at the calendar call on March 11, 1991, in San Francisco, California.

The parties agreed to settle the case based on the "substantiated out-of-pocket expenditures" settlement basis that respondent had offered to other investors in "Airtricity Wind Turbines". Under the agreement, for each year at issue petitioners' tax bases used to determine depreciation and investment credit for their investments in the wind turbines would be recognized to the extent that they could provide substantiation of actual investments made through that year. After petitioners provided respondent with certain substantiation, the proposed

decision document was signed by both counsel for petitioners and respondent and entered by the Court on April 10, 1991. The decision stated that no taxes were due for the taxable years 1983, 1985, and 1986, and $21,004 was due for the taxable year 1984. The decision also stated that no additions to tax were due under sections 6653(a) and 6659 for any of the years at issue.

At some time after signing the decision document, petitioners' counsel reviewed the computations and determined that he disagreed with respondent's calculations used to determine the tax liabilities in the decision that the Court had entered. According to petitioners' counsel, respondent improperly applied section 46(c)(8) and section 48(q) to petitioners' substantiated investments in the wind turbines. Respondent asserted that the appropriate calculations under law were applied to the substantiated bases of petitioners' wind turbine investments.

On July 5, 1991, petitioners filed a motion for leave to file an untimely[2] motion to vacate and revise decision. By order dated July 19, 1991, the Court granted petitioners' motion for leave to file and directed petitioners to file, on or before August 16, 1991, a motion to vacate and revise decision and to submit a proposed decision document and also directed respondent to file, on or before September 13, 1991, a notice of consent to petitioners' proposed

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[2] Rule 162 allows a party 30 days after the entry of a decision to file a motion to vacate or revise the decision. Petitioners' Motion for Leave to File Motion to Vacate and Revise Decision was filed 86 days after the decision was entered.

decision document or an objection thereto, submitting respondent's proposed decision document therewith. After the Court subsequently extended the time for filing these respective documents, petitioners filed a Motion to Vacate on October 7, 1991. Respondent filed a response on October 21, 1991, in which petitioners' computations were disputed. The parties informed the Court that they were proceeding with discussions regarding their differences, and by order dated October 30, 1991, the Court directed the parties to either submit a stipulated decision document or file a status report by December 2, 1991. Respondent filed a status report on December 6, 1991, and petitioners filed a status report on February 11, 1992.

By order dated February 26, 1992, the Court directed the parties to submit a stipulated decision document by March 27, 1992. The parties finally submitted a new stipulated decision document on March 31, 1992. By order dated April 2, 1992, the Court vacated and set aside the decision previously entered on April 10, 1991, and directed the Clerk of the Court to file as a Stipulation of Settlement on May 12, 1992, the decision document submitted on March 31, 1992. The Stipulation of Settlement provided that no deficiencies in tax or additions to tax were due for 1983, 1984, 1985, and 1986.

Petitioners filed their Motion for Litigation Costs on May 12, 1992. Respondent filed an opposition to petitioners' motion on July 13, 1992. Petitioners filed an additional affidavit in support of their Motion for Litigation Costs on August 17, 1992. Neither party has requested a hearing, and the Court concludes that a hearing is not necessary for the proper consideration and disposition of this motion. Rule 232(a)(3).

DISCUSSION

Section 7430(a) authorizes the Court to award reasonable administrative costs and reasonable litigation costs to taxpayers who prevail against the Government in civil tax litigation. This provision was originally enacted by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, sec. 292, 96 Stat. 572, and was amended by the Tax Reform Act of 1986, Pub. L. 99- 514, sec. 1551, 100 Stat. 2752 (effective for proceedings commenced after Dec. 31, 1985), and the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. 100-647, sec. 6239, 102 Stat. 3743-3746 (effective for proceed-ings [sic] commenced after Nov. 10, 1988). Since this proceeding commenced in 1990, those amendments apply in this case.

To obtain an award of litigation costs under those provisions, petitioners must prove that they are the "prevailing party" within the meaning of section 7430(c)(4), which requires, inter alia, that petitioners establish that respondent's position in the proceeding was not substantially justified. In addition, petitioners may not receive an award for litigation costs if they have unreasonably protracted the proceedings. Sec. 7430(b)(4).

Respondent concedes that petitioners satisfy all of the requirements for award of litigation costs under section 7430 except the two above-mentioned requirements. Respondent asserts that once petitioners substantiated the investment amounts, computation of the allowable credits, deductions, and final tax liabilities must be accomplished according to law. Specifically, respondent

applied section 46(c) and section 48(q) in the computations. Petitioners assert that respondent improperly raised these two "new legal issues" in the calculations after the basis for settlement was reached.

Section 46(c)(8)(A) provides that the "credit base" of certain property is reduced by the amount of any nonqualified nonrecourse financing used with respect to such property. The credit base is the tax basis of an asset qualifying for investment credit to which the credit rate is applied to determine the amount of the tax credit allowed. Section 46(c)(8)(F) provides that subparagraph (A) shall not apply to "qualified energy property", which definition requires, inter alia, that any nonqualified nonrecourse financing used with respect to the property constitutes a "level payment loan" within the meaning of section 46(c)(8)(F)(ii)(IV) and (iv). It is clear from the record that petitioners never established that the loans involved in this case were level payment loans or that respondent expressly conceded this requirement as part of the settlement. There is nothing in the record indicating that the settlement precluded application of section 46(c)(8) to petitioners' wind turbines or the financing thereof. Rather the agreement was that petitioners would be granted tax bases for substantiated investments in the wind turbines. Petitioners accepted a reduction of $2,000 in their tax credit carryforward beyond the years at issue in this case in settlement of certain timing issues related to section 46(c) as part of the settlement reached in the Stipulation of Settlement.

Separately, section 48(q) operates to reduce a taxpayer's basis in certain property for which an investment

credit is being claimed for purposes of that credit. However, for property such as petitioners' wind turbines, this section applies only to such property placed in service after December 31, 1982. H. Conf. Rept. 97-760 (1982), 1982-2 C.B. 606-607. Petitioners assert that respondent erroneously believed petitioners placed a wind turbine in service during 1983, when it was actually placed into service during 1982. Thus, petitioners claim that section 48(q) is inapplicable to this wind turbine investment and their basis cannot be reduced thereby. In the Stipulation of Settlement, respondent conceded this point and did not apply section 48(q) to petitioners' property placed in service in 1982.

However, it is clear from respondent's Memorandum Brief in Opposition to Petitioners' Claim and Motion for Litigation Costs and attachments thereto that during most of the time period that petitioners sought recovery of litigation costs petitioners were arguing against application of section 48(q) for the years 1983, 1984 and 1985, as well as 1982. Instead of specifying the grounds for their objection to the application of section 48(q), petitioners summarily demanded that respondent "drop all of the new issues concerning section 48(q)" arguing that such issues were not part of the basis for settlement. Not until late January or early February 1992 did petitioners clarify their contention that section 48(q) was inapplicable to property placed in service during 1982 and provide substantiation of such.

The fact that respondent eventually loses or concedes the case is not sufficient to establish that the positions taken were unreasonable. *Sokol v. Commissioner*, 92 T.C.

760, 767 (1989). Where there are factual questions regarding tax returns, respondent is not obligated to concede the case until the necessary documentation is received to prove the taxpayer's contentions and claims. *Sokol v. Commissioner,* supra at 765. Awards of litigation costs may be denied where taxpayers are in possession of information relevant to case settlement and fail to be forthcoming with those facts and arguments. Sec. 7430(b)(4); *Polyco, Inc. v. Commissioner,* 91 T.C. 963, 968 (1988); see also *DeVenney v. Commissioner,* 85 T.C. 927, 933 (1985).

There is nothing before the Court that indicates that the parties agreed in February/March 1991 to a settlement regarding the final tax liabilities for the years at issue. Rather, it is apparent that petitioners agreed to accept respondent's out-of-pocket settlement offer regarding what investment amounts would be used to determine the bases of petitioners' investments and in which tax years. There is no indication that the parties agreed to limit application of otherwise applicable sections of the Internal Revenue Code. While the final Stipulation of Settlement resulted in no deficiencies and no additions to tax for the years at issue, we hold that it was not unreasonable for respondent to apply the law to the agreed tax bases of petitioners' assets in calculating credits, deductions, and the resulting tax liabilities. Petitioners did not facilitate this process by simply demanding that respondent drop the application of section 48(q) rather than provide the information and substantiation which, when eventually provided, concluded the dispute in petitioners' favor.

Specifically, we note that petitioners belatedly informed respondent of the facts and arguments that

section 48(q) was being misapplied to property acquired in 1982 rather than flatly objecting to the imposition of "two new legal theories" to the case (i.e., application of sections 46 and 48 to substantiated bases). Significantly, we also note that petitioners knew the results of respondent's calculations for more than a month before the Court entered the decision in this case. Petitioners waited another 86 days before filing their Motion for Leave to File Motion to Vacate and Revise Decision. Apparently, petitioners waited until they received respondent's calculations before questioning or even examining and checking the final tax liability amounts.

Under these circumstances, we hold that respondent's position in the litigation was substantially justified and that petitioners unreasonably protracted these proceedings.

Therefore, petitioners' Motion for Litigation Costs will be denied.

An appropriate order and decision will be entered.